89-1098

No.

Supreme Court, U.S.
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1989

NATIONAL ASSOCIATION OF RETIRED FEDERAL EMPLOYEES,
Petitioner,

v.

CONSTANCE BERRY NEWMAN, DIRECTOR,
OFFICE OF PERSONNEL MANAGEMENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

JOSEPH B. SCOTT
IRVING KATOR
MICHAEL J. KATOR *
KATOR, SCOTT & HELLER
1275 K Street, N.W.
Suite 950
Washington, D.C. 20005
(202) 898-4800
Counsel for Petitioner

* Counsel of Record

January 11, 1990

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTION PRESENTED

Whether the court below erred in construing the personal privacy exemption of the Freedom of Information Act, 5 U.S.C. § 552(b)(6), which precludes release of files "the disclosure of which would constitute a clearly unwarranted invasion of personal privacy," categorically to prohibit the release of names or addresses maintained in government files.

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CONSTANCE BERRY NEWMAN, DIRECTOR,
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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The National Association of Retired Federal Employees (NARFE) hereby petitions this Court for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit.

OPINIONS BELOW

The opinion of the court of appeals (App. A *infra*, 1a-14a) is reported at 879 F.2d 873. The orders of the court of appeals denying the petition for rehearing and the suggestion for rehearing *en banc*, and the accompanying statement of Chief Judge Wald (App. B *infra*, 15a-17a), are unreported. The opinion of the district court (App. C *infra*, 18a-27a) is reported at 633 F. Supp. 1241.

JURISDICTION

The time for filing this petition was extended to January 11, 1990, and this petition is therefore filed within the time allowed by law. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The Freedom of Information Act, 5 U.S.C. 552(b)(6) provides, in pertinent part that:

> (b) This section [requiring disclosure of information] does not apply to matters that are—
>
> * * * *
>
> (6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy * * *.

STATEMENT

This is an action under the Freedom of Information Act, 5 U.S.C. 552 (FOIA), by NARFE, a nonprofit association. From its inception in 1947, NARFE has grown from fourteen charter members to a membership now approaching half a million federal annuitants (retirees and survivors) living throughout the fifty states, Puerto Rico, the Canal Zone, and several foreign countries. NARFE has been a major advocate in maintaining the integrity of the federal government's civilian retirement system and it has been directly involved, through lobbying and related activities, in all legislative and executive changes in these systems over the past six decades.

NARFE's goal is to identify issues of particular importance to federal annuitants, to inform them, through its newsletter and other publications, and the state and local chapter network, of these issues, and to act upon them to further the common goals of NARFE's members. NARFE also assists federal annuitants in obtaining benefits to which they may be entitled under the retire-

ment laws and by interacting with various federal agencies on such matters as federal annuities and health and insurance benefits.

This litigation stems from NARFE's attempts to obtain the names and home addresses of individuals recently added to the civil service retirement rolls. In each year from 1979 through 1981, NARFE and the Office of Personnel Management (OPM) cooperated to disseminate a description of NARFE's purposes and a solicitation for membership to persons who had recently become federal annuitants (both retirees and survivors). NARFE prepared special mailers, OPM prepared the mailing labels, and a mailing service was contracted to affix the labels and mail the materials. All costs of this procedure, including reimbursement for OPM's computer time and the cost of labels, were borne by NARFE.

For "policy" reasons, OPM refused to continue this arrangement in 1982 and thereafter. Instead, OPM invited NARFE to request the names and addresses through the FOIA. NARFE did so, and even offered to accept only the addresses of the annuitants and to disseminate its information through letters addressed "Dear Annuitant." The FOIA request was denied on the stated ground that disclosure of the requested information would constitute a "clearly unwarranted invasion of personal privacy."

During the next few years, NARFE attempted to reach new annuitants through other means. When this proved ineffective (NARFE's membership grew by only a few thousand during these years compared to approximately one quarter million during the period of cooperation with OPM), NARFE renewed its FOIA request with OPM, exhausted is administrative remedies, and then initiated this action.

The district court held that the individuals whose names were sought had only slight privacy interests in

their names and home addresses, and that those interests were outweighed by the public interest in disclosure. On the basis of this balancing of the competing interests, the district court rejected OPM's "clearly unwarranted invasion of personal privacy" defense and ordered it to produce the names and addresses requested. App. C, 25a-26a. The government appealed.

After hearing argument in April 1987, the court of appeals deferred action on the case pending this Court's ruling in *Department of Justice* v. *Reporters Committee for Freedom of the Press*, 109 S.Ct. 1468 (1989). Subsequent to that ruling the court of appeals reversed the district court, concluding, expressly on the authority of this Court's decision in *Reporters Committee*, that disclosure of the requested names and addresses would constitute a clearly unwarranted invasion of personal privacy within the meaning of Exemption 6 to the FOIA. This was so, according to the court, because there was a "modest" privacy interest implicated and absolutely no public interest in disclosure, and "something * * * outweighs nothing every time." App. A, 13a-14a.

The court of appeals thereafter denied NARFE's petition for rehearing and the suggestion for rehearing *en banc*. With respect to the latter, Chief Judge Wald issued a statement noting that she was not convinced that the standard enunciated by this Court in *Reporters Committee* for the FOIA's Exemption 7(C) "is appropriate for more neutral non-law enforcement records with limited potential for privacy invasions, such as addresses of retirees from the federal government" (App. B, 17a) that implicate the privacy provisions of Exemption 6. While not voting for rehearing *en banc* because "the reasoning and result in the panel ruling is not without some plausibility," she did "foresee outright conflict with the language and intent of the Freedom of Information Act if the *Reporters* test is applied inflexibly in all future Exemption 6 cases." *Ibid.*

This petition timely followed.

REASONS FOR GRANTING THE PETITION

This case presents issues of substantial public importance concerning the scope of the "general philosophy of full agency disclosure" (*Department of Air Force* v. *Rose*, 425 U.S. 352, 360 (1976)) that is embodied in the Freedom of Information Act (FOIA), 5 U.S.C. § 552. More specifically, in *Reporters Committee* this Court established rules for application of the "more flexible standard" for non-disclosure contained in FOIA Exemption 7(C), noting expressly that "Exemption 7(C)'s privacy language is broader than the comparable language in Exemption 6 * * *." 109 S.Ct. at 1472. Despite this, the court below has ignored the significant differences between the privacy provisions of Exemptions 7(C) and Exemption 6 and, relying on *Reporters Comittee*, has in effect authorized categorical nondisclosure where "neutral non-law enforcement records with limited potential for privacy invasions" (App. B, 17a) are involved.

Exemption 6 strikes the critical balance between the dual congressional purposes of full agency disclosure embodied in the FOIA and protection of personal privacy secured by the Privacy Act. Consequently, cases calling for application Exemption 6 arise in virtually every federal agency and court throughout the country. Moreover, because of the concentration of federal agencies in the District of Columbia, and because the District of Columbia is a statutorily-favored forum for FOIA litigation (5 U.S.C. § 552(a)(4)(B)), the decision below has particularly far-reaching consequences. Review by this Court is needed to avert what Chief Judge Wald rightly foresees as "outright conflict with the language and intent of the Freedom of Information Act if the *Reporters* test is applied inflexibly" (*ibid.*), as it has been here.

1. This Court in *Reporters Committee* stressed that Exemption 7(C)'s privacy language is "broader" than the comparable language of Exemption 6 in two significant respects. 109 S.Ct. at 1472-73. First, prior to 1986,

Exemption 7(C), like Exemption 6, applied to disclosures that "would constitute" an invasion of privacy. In 1986, however, Congress amended Exemption 7(C) to substitute for the phrase "would constitute" the phrase "could reasonably be expected to constitute." The Court has noted that this amendment

> represents a considered congressional effort 'to ease considerably a Federal law enforcement agency's burden in invoking [Exemption 7]' * * * * [I]n determining the impact on personal privacy from disclosure of law enforcement records or information, the stricter standard of whether such disclosures 'would' constitute an unwarranted invasion gives way to the more flexible standard of whether such disclosure 'could reasonably be expected to' constitute such an invasion.

Reporters Committee, 109 S.Ct. at 1473 n. 9 (quoting 132 Cong. Rec. S16504 (Oct. 15, 1986) (statement of Sen. Hatch)).

Despite the fact that other courts have correctly viewed the distinctions between Exemption 7(C) and 6 that were noted in *Reporters Committee* as "crucial" (*Halloran* v. *Veterans Administration*, 874 F.2d 315, 319 (5th Cir. 1989)), the court below inexplicably makes no mention at all of these distinctions, even as it putatively relies on *Reporters Committee*. Indeed, while ignoring the "crucial" and dispositive distinctions noted by this Court, the court below finds commonality in the unexceptional fact that both Exemption 6 and Exemption 7(C) call "for a balancing of private against public interests." App. A, 4a.

The lower court's failure to acknowledge the important substantive differences between the two exemptions is significant because it led it substantially to overstate the character of the privacy interest that the request here implicated. It seems plain that a court with responsibility to determine whether a disclosure "would constitute"

an invasion of privacy must limit its inquiry to the evidence of record bearing on that issue. At the same time, a court addressing Exemption 7(C) and reviewing the issue whether a disclosure "could reasonably be expected to constitute" an invasion, should be permitted under the more relaxed standard to make reasonable speculations about the consequences of the disclosure. In this Exemption 6 case, however, the court below predicated its view that disclosure "would" constitute a clearly unwarranted invasion of privacy solely on its own speculations and imaginings about what would ensue from disclosure.

That the decision below is fraught with conjecture and surmise in this regard can hardly be gainsaid: "Armed with this information, interested businesses, charities, and individuals could, and undoubtedly would, subject the listed annuitants 'to an unwanted barrage of mailings and personal solicitations' " (App. A, 7a); "there is little reason to doubt that the barrage of solicitations predicted [by the court itself] will in fact arrive" (App. A, 10a); "there is substantial probability that the disclosure will lead to the threatened invasion: one need only assume that business people will not overlook an opportunity to get cheaply from the Government what otherwise comes dearly * * *." (App. A, 11a-12a).

The paradox here is that the court sought to distinguish its own earlier ruling in *Arieff* v. *Department of the Navy*, 712 F.2d 1462 (D.C. Cir. 1983), on the ground that it had there condemned nondisclosure on the basis of "mere speculation" about the alleged untoward consequences of disclosure. App. A, 11a. But, that is precisely and solely what the court of appeals is here relying on to arrive at its view that "the invasion of the annuitants' privacy interest will be more than *de minimis*; it will be significant." App. A, 12a.[1] But *Department of the Air*

[1] The court's hyperbole apparently knows no bounds. For it even contends that the privacy intrusion is no less even if only addresses, without names, are disclosed—"the privacy concerns raised by the

Force v. *Rose*, 425 U.S. 352 (1976), is still good FOIA law, and it emphatically held that "Exemption 6 was directed at threats to privacy interests more palpable than mere possibilities." 425 U.S. at 380 n.19.

The point is that the court below has wholly blurred the "crucial" distinction between the privacy provisions of Exemptions 6 and 7(C), the former requiring a record-based finding that disclosure *would* intrude upon privacy interests beyond a *de minimis* level, while the latter permits speculation as to whether it *could*. Since the ultimate judicial responsibility under both exemptions is to balance the competing privacy and public interests, the failure to recognize and apply the differences in statutory language and intent [2] will obviously improperly skew the balancing outcome, as it has done here.

2. The second difference between Exemptions 7(C) and 6 is that, unlike Exemption 6, which requires that an invasion of privacy be "clearly unwarranted" before nondisclosure is authorized, Exemption 7(C) omits the adverb "clearly" and requires only that the invasion be "unwarranted." The omission was the product of explicit bargaining between the executive and legislative branches and reflects Congress' intent that "the standard

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release of the addresses alone are substantially identical to those raised by the release of both names and addresses." App. 12a. Of course, this view that the intrusion is not ameliorated by eliminating the names is facially nonsensical. It also ignores this Court's emphasis on the fact, in the Exemption 7(C) context, that records "identifiable by name" are "what the framers of the FOIA had in mind." 109 S.Ct. at 1477. The concern cannot be otherwise in the less-stringent Exemption 6 context.

[2] It is significant that on several occasions amendments were offered to reduce the government's evidentiary burden under Exemption 6, *i.e.*, to allow disclosure where the government could show a reasonable expectation that release would constitute an invasion of privacy, but these amendments were not enacted. See S. Rep. No. 221, 98th Cong. 2d Sess. 45 (1983); S. 150, "The Freedom of Information Reform Act," 99th Cong. 1st Sess. (1985).

for evaluating a threatened invasion of privacy interests resulting from the disclosure of records compiled for law enforcement purposes" be somewhat broader than that used for Exemption 6. 109 S.Ct. at 1472-1473.

Bearing this distinction in mind, in *Reporters Committee* this Court concluded that Exemption 7(C) disclosure of personal and medical information would only be "warranted" where such disclosure would "shed light on an agency's performance of its statutory purpose." 109 S.Ct. at 1481. In defining an "unwarranted" invasion of privacy, the Court considered what would be a warranted invasion of privacy. Finding that information contained in "rap sheets" would shed light only on what individuals, and not federal agencies, were up to, the Court concluded that such information *categorically* was protected from disclosure.

This Exemption 7(C) analysis, adopted wholesale by the court below, is unworkable in Exemption 6 cases. Unlike "unwarranted," "clearly warranted" cannot be defined by negative implication. Knowing that an invasion of privacy falls outside the universe of warranted invasions necessarily reveals that the invasion is unwarranted. What is warranted cannot be unwarranted, and what is unwarranted cannot be warranted. This is so not only because "warranted" and "unwarranted" are antonyms in a lexicological sense, but also because they are mutually exclusive concepts.

On the other hand, it is not enough to know only what is warranted to ascertain what is *clearly* unwarranted. Because the clearly unwarranted standard is more stringent and allows less withholding that the unwarranted standard, there are circumstances in which release might constitute an unwarranted invasion of privacy, but not a clearly unwarranted invasion. *Reporters Committee* did not purport to define "clearly unwarranted" invasions of privacy, although it stressed the difference between the two standards. Notwithstanding that this is

the dispositive statutory language in this case, the court below failed completely to address it. Again, this distinction between Exemption 7(C) and Exemption 6 is of paramount significance, for the present case as well as the myriad other Exemption 6 cases pending in this and other courts.[3]

The dispositive issues here, therefore, is what is meant by "clearly unwarranted." On its face, it connotes a heavier government burden and a greater tipping of the scales in favor of disclosure. If this were not so, "clearly" would be mere surplusage intended to have no meaning, an axiomatically disfavored construction.

In any event, even treating *Reporters Committee's* identification of shedding light on agencies' performance of their statutory duties as the predominant purpose of the FOIA, there are other "core" purposes behind the FOIA and other ways in which release of information can further the public interest. These must be taken into account in conducting the balancing mandated by Exemption 6, and nothing in *Reporters Committee* suggests otherwise.

For example, the release of the information sought here will facilitate NARFE's representation of the rights and interests of retired federal employees and the aged in general before the Congress and agencies of the United States government. The release of the information will enhance NARFE's ability to determine and advise the

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[3] *See Government Employees, AFGE* v. *Department of Health and Human Services*, No. 89-444 (challenging use of *Reporters Committee* to deprive union of names and addresses of bargaining unit employees); *National Treasury Employees Union* v. *Department of Treasury*, No. 89-566 (same). *Cf. Retired Officers Ass'n* v. *Department of the Navy*, 716 F.Supp. 662 (D.D.C. 1989) (allowing release of names and addresses of retired naval officers); *Ray* v. *Department of Justice*, 725 F.Supp. 502 (S.D. Fla. 1989), *appeal dism'd*, No. 89-5941 (11th Cir. Dec. 26, 1989) (ordering release of names of Haitians returned to Haiti and not mistreated on their arrival).

citizenry of "what the government is up to" and it will enhance a significant portion of the citizenry's reciprocal ability to advise NARFE what the government is doing to them. Undeniably, a core purpose of the FOIA is to facilitate the democratic process, and undeniably release of the information sought there would further that end.

Moreover, there are myriad other ways in which release of the information sought here would further the public interest. For example, litigation is currently ongoing in approximately 20 states in the aftermath of *Davis* v. *Michigan*, 109 S.Ct. 1500 (1989). These suits, some of them class actions, seek to obtain refunds for state income taxes collected in violation of the Supremacy Clause of the Constitution. Should the federal annuitants prevail, as they have in Missouri,[4] they will have to pay federal income tax on the amount of their recoveries. Cumulatively, this could result in over $1 billion being returned to the United States. Release of the requested information will facilitate the prosecution of these actions and thereby enhance the government's opportunity to increase its tax revenues.[5] In this day and

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[4] *Hackman* v. *Director of Revenue*, 771 S.W.2d 77 (Mo. *banc* 1989), *cert. denied*, No. 89-433 (Jan. 8, 1990).

[5] In *Ditlow* v. *Schultz*, 517 F.2d 166 (D.C. Cir. 1975), the court below authorized the disclosure from customs records of the names and addresses of certain individuals who had flown overseas. These individuals could then be notified by the requesting attorney of their right to join a class action lawsuit seeking damages for airline overcharges. The same thing could be said here, with the added public interest in enhancing the public fisc instead of merely the bank accounts of the affected individuals. The court's attempt to distinguish *Ditlow* ignores this point. Instead it makes the specious claim that it could "not imagine" that anyone other than the single requester would ever request the information and contact the individuals. App. A, 7a. Obviously, however, it is as reasonable to assume that such persons would be contacted—by travel agents, researchers, purveyors of travel goods, and the like—as it is to assume that annuitants would be contacted by other than NARFE. *Ditlow* simply cannot be distinguished from this case. The lower court's attempt to do so is specious.

age, it cannot be gainsaid that this is in the public interest.

The decision below concludes that release of the requested information will not inform the public "directly" about the workings of the government.[6] Yet this narrow focus is inappropriate in Exemption 6 cases. Even if *Reporters Committee* could be read to hold that all disclosure of personal and medical information that did not shed light on the inner workings of the government were *per se* unwarranted, necessarily the focus would have to be broader to ascertain whether such release constituted a "clearly unwarranted" invasion. If disclosure would serve another of the core purposes of the FOIA or would in other ways further the public interest, then release of the information might constitute an unwarranted, but not *clearly* unwarranted invasion of privacy.

3. While the decision below goes out of its way to state that it is not creating a categorical exclusion for all names and addresses cases, its adoption of *Reporters Committee's* restrictive public interest analysis forecloses release in all cases except where there is only a *de minimis* privacy interest. For, as the court held, "something . . . outweighs nothing every time." App. A, 13a. Release of personal or medical information, and in particular release of names and addresses, can *never* inform the public directly about the workings of the government. Under the court's reasoning, the public interest side of the equation is always zero and this disclosure is possible only if no balancing is undertaken at all; *i.e.*, if the privacy interests implicated are *de minimis*.

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[6] The decision does not purport to provide a statutory anchor for its contradictory views that privacy interests can be implicated by uses of the information "two or three links [down] the causal chain," (App. A, 10a) yet assessment of the public interest hinges on the public learning something directly from the released information.

To be sure, the court touts *Ditlow* as an example of a case in which names and addresses would be disclosable (presumably, although *Ditlow* did not so hold, because the privacy implications were *de minimis*). Again, while the court could not imagine any other use of the information sought in *Ditlow*, a government lawyer surely could have been able to construct an alternative use for the information: perhaps a charity which focuses on Asian causes would be interested in a pasesnger list; or perhaps a rival airline would like to make direct solicitation of passengers. The lower court's approach makes certain that in future Exemption 6 litigation a premium will be placed on government counsel's ability to fashion expansive and invasive potential uses of the information sought. Under the court of appeals' analysis, this ends the inquiry (something outweighs nothing every time), and thus names and addresses are *per se* nondisclosable.

This result is a complete inversion of the purposes and policies of the FOIA. Congress has provided that personal or medical information will be disclosed unless release would constitute a clearly unwarranted invasion of privacy; the lower court's analysis provides such information will be released only if there is a *de minimis* privacy interest implicated. Congress certainly was capable of imposing an absolute bar to the release of personal or medical information. It chose not to, and it is not for the court of appeals to second-guess that judgment.

Indeed, compelling legislative history exists which flatly contradicts that Congress intended the result reached by the lower court. Specifically, after "the most exhaustive examination of the Freedom of Information Act in its history," in 1983 a bill seeking to amend the FOIA was introduced and referred to the Senate Judiciary Committee. *See* S. Rep. No. 221 at 1. This bill, which included the provisions amending Exception 7(C) that were ultimately enacted in 1986, also included pro-

posed amendments to Exemption 6. The bill would have amended Exemption 6 to exempt from disclosure

> records of information concerning individuals, including compilations or lists of names and addresses that could be used for solicitation purposes, the release of which could reasonably be expected to constitute a clearly unwarranted invasion of personal privacy.

S. Rep. No. 221 at 45. This amendment was not enacted, however, and neither was an identical bill presented in the 99th Congress. *See* S. 150, *supra*.

While Congress refused to enact this proposed amendment, and this is significant of itself, more significantly, the legislative history of this amendment indicates that even had the amendment been enacted, release would nonetheless be required in this case. In the Judiciary Committee Report, the proposed amendment was explained as follows:

> Finally, the amendment makes it clear that lists of names and addresses which "could be used for solicitation purposes" are subject to the exemption, if disclosure could reasonably be expected to constitute a clearly unwarranted invasion of personal privacy. By requiring the courts to balance the interest in disclosure of such lists against the interest in privacy, the Committee recognizes that disclosure may be appropriate in some circumstances. *See Disabled Officer's Association* v. *Rumsfeld*, 428 F.Supp. 454 (D.D.C. 1977) (list of disabled retired military personnel disclosed to nonprofit organization established to assist members in pursuing benefits and advocating their interests nationally).

S. Rep. No. 221, *supra* at 22.[7]

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[7] The District Court relied principally on *Disabled Officer's* in ordering the release here. App. C, 23a-24a. Despite the approbation given to that ruling in the cited legislative history, the court below in effect concludes that it was wrongly decided. App. A, 9a. Since the decision in *Disabled Officer's* was based on statute, not

Congress would not have sought to amend the FOIA to preclude release of mailing lists had it not thought such lists disclosable under existing law. Yet even in this proposed amendment, Congress disavowed the lower court's stringent interpretation of public interest, specifically requiring a balancing in each case. Most significantly, however, Congress indicated how that balance should turn out in cases such as this: the lists should be released.

Thus, the lower court's result not only lacks statutory foundation, it flouts the relevant legislative history as well. Congress never intended the FOIA to preclude release of information such as that sought here. The court of appeals' contrary conclusion is unsupportable.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari to the United States Court of Appeals for the District of Columbia should be granted.

Respectfully submitted,

JOSEPH B. SCOTT
IRVING KATOR
MICHAEL J. KATOR *
KATOR, SCOTT & HELLER
1275 K Street, N.W.
Suite 950
Washington, D.C. 20005
(202) 898-4800
Counsel for Petitioner

January 11, 1990

* Counsel of Record

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the Constitution, it is difficult to see how the court could disregard the Congressional approval and conclude that *Disabled Officer's* is no longer good law.

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued April 4, 1987 Decided July 7, 1989

No. 86-5446

NATIONAL ASSOCIATION OF RETIRED FEDERAL EMPLOYEES

v.

CONSTANCE HORNER, DIRECTOR, OFFICE OF PERSONNEL MANAGEMENT,

Appellant

Appeal from the United States District Court for the District of Columbia

(Civil Action No. 85-01739)

Al J. Daniel, Jr., Attorney, Department of Justice, with whom *Richard K. Willard*, Assistant Attorney General, *Joseph E. diGenova*, United States Attorney, and *Leonard Schaitman*, Attorney, Department of Justice, were on the brief, for appellant.

Michael J. Kator, with whom *Joseph B. Scott* and *Irving Kator* were on the brief, for appellee.

Before: SILBERMAN, BUCKLEY, and D.H. GINSBURG, *Circuit Judges*.

Opinion for the Court filed by *Circuit Judge* D.H. GINSBURG.

D.H. GINSBURG, *Circuit Judge*: Constance Berry Newman, Director of the Office of Personnel Management, appeals a decision of the district court ordering OPM pursuant to the Freedom of Information Act, to disclose

to the National Association of Retired Federal Employees the names and addresses of retired or disabled federal employees. OPM appeals on the ground that the requested records are non-disclosable under FOIA Exemption 6, which applies to certain types of files "the disclosure of which would lead to a clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6). Based largely upon the Supreme Court's recent decision in *Department of Justice v. Reporters Committee for Freedom of the Press*, 109 S. Ct. 1468 (1989), we reverse the judgement of the district court.

I. Facts

NARFE exists to protect and to further the interests of individuals eligible to participate in the federal Government's civilian retirement system. Between 1979 and 1981, OPM (and its predecessor, the Civil Service Commission) assisted NARFE in its efforts to recruit new members through jointly issued "blind mailings"; NARFE would prepare informational packets that an independent mailing service would then send to newly enrolled federal annuitants. If a recipient responded with an expression of interest, OPM would provide NARFE with his or her name and address.

OPM discontinued its assistance to NARFE in 1982. Without OPM's aid, and without any alternative source for the names and addresses of recent retirees, NARFE's efforts to enroll substantial numbers of new members were frustrated. In early 1985, therefore, it asked OPM, pursuant to FOIA, for a list of "the names and addresses of persons who were added to the annuity rolls between April 1, 1981 and December 31, 1984." OPM denied the request, invoking FOIA Exemption 6.

NARFE then filed suit in the district court. On cross-motions for summary judgment, the court granted NARFE's motion, holding that a person's "relatively minor" privacy interest in control over who has access

to his name, address, and status as a federal annuitant is outweighed by "the public interest in disclosure [that] flows from NARFE's services and the fact that many annuitants might be pleased to learn of them." *National Ass'n of Retired Federal Employees v. Horner*, 633 F. Supp. 1241, 1245 (D.D.C. 1986). OPM appealed.

After oral argument of the appeal in this court, the Supreme Court granted *certiorari* to review our earlier decision in *Reporters Committee*. Because *Reporters Committee* raised an issue relevant to the present case, we ordered that this case be held in abeyance pending the Supreme Court's decision. After that decision issued, we ordered supplemental briefing on its implications for this case. We now reverse the judgment of the district court.

II. Analysis

Under FOIA, an agency must disclose all records requested by "any person," 5 U.S.C. § 552(a)(3), unless the information sought falls within a specific statutory exemption. 5 U.S.C. § 552(d), Exemption 6 provides that an agency shall not disclose "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6).

NARFE does not dispute that the names and addresses of recent annuitants are covered by the phrase "personnel and medical files and similar files," and that Exemption 6 is therefore relevant to them. Accordingly, we must first determine whether their disclosure would compromise a substantial, as opposed to a *de minimis*, privacy interest. If no significant privacy interest is implicated (and if no other Exemption applies), FOIA demands disclosure. *See Department of Justice v. Tax Analysts*, 57 U.S.L.W. 4925, 4929-30 (U.S. June 23, 1989). If, on the other hand, a substantial privacy interest is at stake, then we must weigh that privacy interest in nondisclosure against the public interest in the release

of the records in order to determine whether, on balance, disclosure would work a clearly unwarranted invasion of personal privacy. *Ripskis v. Department of Housing and Urban Development*, 746 F.2d 1, 3 (D.C. Cir. 1984). *Cf. Reporters Committee*, 109 S. Ct. at 1476 (Exemption 7, which covers law enforcement records the disclosure of which "could reasonably be expected to constitute an unwarranted invasion of personal privacy," calls for a balancing of private against public interests.).

A. *Privacy Concerns*

The Supreme Court has made clear that Exemption 6 is designed to protect personal information in public records, even if it is not embarrassing or of an intimate nature: "Information such as place of birth, date of birth, date of marriage, employment history, and comparable data is not normally regarded as highly personal, and yet . . . such information . . . would be exempt from any disclosure that would constitute a clearly unwarranted invasion of personal privacy." *Department of State v. Washington Post Co.*, 456 U.S. 595, 600 (1982). The question that remains is the extent of the interference with privacy that would be caused by disclosure of the name, address, and annuitant status information at issue in this case.

Before the Supreme Court decided *Reporters Committee*, NARFE's primary argument was that its planned use of their names and addresses would not occasion significant annoyance to the annuitants. *Reporters Committee* makes clear, however, that this not the relevant consideration. The Court there held that, with exceptions not here relevant, "the identity of the requesting party has no bearing on the merits of his or her FOIA request," explaining, "The Act's sole concern is with what must be made public or not made public." 109 S. Ct. at 1480-81 (internal quotation omitted). True, the Court made this broad observation in the course of discussing

how to assess the public interest in disclosure, not in its consideration of the private interests in non-disclosure. That is not surprising, however, for in that case, the plaintiff reporters, who had requested "rap sheets" (personal criminal histories) of four individuals, were in no position to argue that what they would do with the information would be somehow less intrusive than the uses to which others might put it; the Court was therefore not faced with the question whether "the identity of the requesting party" is equally irrelevant to the private interest side of the balance. We conclude that it is, for two reasons.

First, the Court's statement of the irrelevance principle is not limited in terms to the public interest inquiry; it is in terms applicable to "the Act" as a whole. Second, such a limitation would not make sense. The statute requires that non-exempt files be disclosed to "any person." 5 U.S.C. § 552(a)(3). That is, information available to anyone is information available to everyone. Because a court cannot limit the disclosure of records to particular parties or for particular uses, it would be illogical as well as unfair to the person whose privacy is at stake for the court to balance the public interest in disclosure to the whole world against the private interest in avoiding disclosure only to the party making the request, and to ignore the impact on personal privacy of the more general disclosure that will likely ensue.

In this context, the privacy interest of an individual in avoiding the unlimited disclosure of his or her name and address is significant, as several other circuits have held. *See Department of Agriculture v. FLRA*, 836 F.2d 1139, 1143 (8th Cir. 1988); *Minnis v. Department of Agriculture*, 737 F.2d 784, 787 (9th Cir. 1984); *Heights Community Congress v. Veterans Administration*, 732 F.2d 526, 529 (5th Cir. 1984); *American Federation of Government Employees v. United States*, 712 F.2d 931, 932 (4th Cir. 1983); *Wine Hobby USA, Inc. v. IRS*, 502

F.2d 133, 136-37 (3d Cir. 1974). In our society, individuals generally have a large measure of control over the disclosure of their own identities and whereabouts. That people expect to be able to exercise that control "is evidenced by . . . unlisted telephone numbers, by which subscribers may avoid publication of an address in the public directory, and postal boxes, which permit the receipt of mail without disclosing the location of one's residence." *Heights*, 732 F.2d at 529.

Privacy in the sense of "an individual's control of information concerning his or her person," *Reporters Committee*, 109 S. Ct. at 1476, is not the only interest implicated in this case, moreover. Every list of names and addresses sought under FOIA is delimited by one or more defining characteristics, as reflected in the FOIA request itself; no one would request simply all "names and addresses" in an agency's files, because without more, those data would not be informative. The extent of any invasion of privacy that release of the list might occasion thus depends upon the nature of the defining characteristics, *i.e.*, whether it is significant that an individual possesses them. A non-embarrassing characteristic may or may not be otherwise significant, in a manner relevant to the individual's privacy interests, depending upon whether many parties in addition to the party making the initial FOIA request would be interested in obtaining a list of and contacting those who have the characteristic.

Thus, in *Ditlow v. Schultz*, 517 F.2d 166 (D.C. Cir. 1975), a lawyer representing a class of passengers who were overcharged by airlines requested disclosure from Customs records of the names and addresses of individuals who "returned to the United States from Asia or Australia by air sometime between May 1 and September 1, 1973," so that he could notify them by mail that they were members of the class and might be entitled to damages. *Id.* at 170 n.15. The *Ditlow* court sensibly analyzed the case on the assumption that "the *only* con-

sequence" for those named in the disclosed records would be their receipt of the mailed notice. *Id.* (emphasis added). There is no suggestion, and we can not imagine, that anyone else would use the list for any other purpose.

In *Aronson v. Department of Housing and Urban Development*, 822 F.2d 182 (1st Cir. 1987), on the other hand, the court was faced with a request for a list of individuals "owed a substantial sum of money" upon termination of their HUD mortgage insurance policies. *Id.* at 186. There, although the court was ambivalent about whether the release of names and addresses alone would implicate significant privacy interests, it was confident, as are we, that that interest "becomes more significant . . . when names and addresses are combined with [such] financial information. *Id.* Said the court, "When it becomes a matter of public knowledge that someone is owed a substantial sum of money, that individual may become a target for those who would like to secure a share of that sum by means scrupulous or otherwise." *Id.*

As in *Aronson*, but not in *Ditlow*, disclosure of the information requested here would interfere with the subjects' reasonable expectations of undisturbed enjoyment in the solitude and seclusion of their own homes. The list at issue here reveals not only the names and addresses of hundreds of thousands of individuals; it also indicates that each is retired or disabled (or the survivor of such a person) and receives a monthly annuity check from the federal Government. Any business or fund-raising organization for which such individuals might be an attractive market could get from the Government, at nominal cost, a list of prime sales prospects to solicit. Armed with this information, interested businesses, charities, and individuals could, and undoubtedly would, subject the listed annuitants "to an unwanted barrage of mailings and personal solicitations." *Minnis*, 737 F.2d

at 787. In light of the Supreme Court's affirmation, in a different context, that "[t]he ancient concept that 'a man's home is his castle' into which 'not even the king may enter' has lost none of its validity . . .," such a fusillade cannot readily be deemed a *de minimis* assault on the privacy of those within.

NARFE contends nonetheless that any such interference with the annuitants' privacy interests would be insufficient to support non-disclosure under Exemption 6. It relies for this proposition (as did the district court) upon *Ditlow, Getman v. NLRB*, 450 F.2d 670 (D.C. Cir. 1971), and *Disabled Officer's Ass'n v. Rumsfeld*, 428 F. Supp. 454 (D.D.C. 1977), *summarily aff'd*, 574 F.2d 636 (D.C. Cir. 1978), each of which held that a name and address list was not within Exemption 6.

In *Getman*, the court expressly relied upon the proposition that the balancing requirement of "Exemption 6 carries with it an implicit limitation that the information, once disclosed, [may] be used only by the requesting party and for the public interest purpose upon which the balancing was based," 450 F.2d at 677 n.24, a view that, as we have seen, above at 4-5, cannot be squared with the Supreme Court's subsequent decision in *Reports Committee*. If that proposition were correct, then the only threat to their privacy that voters in certain union representative elections faced would have been a solicitation to participate in the plaintiffs' academic study—a "relatively minor invasion of privacy," as we said. *Id.* at 675. Thus, *Getman* is not (exempt in its adoption of a legal standard that was later disapproved) in any sense contrary to our analysis here.

In *Ditlow*, Judge Leventhal determined that disclosure of the list of airline passengers, though "not a clearly inconsequential loss of privacy . . . would result in less than a substantial invasion of privacy." 517 F.2d at 170. As we have seen, however, the court reached that conclusion based upon the understanding that (whether be-

cause of practical realities or of the limitation in *Getman* is not clear) "the only consequence of the exposure here is a mailed notice informing the person that he is a member of a class and may be awarded damages . . . ." *Id.* at 170 n.15. The consequences in the case before us are likely to be more significant because the name and address list at issue here is of apparent commercial value.

Finally, in *Disabled Officer's*, which is factually similar to this case, the district court anticipated that release of the names and addresses of disabled military retirees "could expose them to unwanted solicitation or even harassment," but ordered it anyway. The court expressly proceeded on the understanding, however, that Exemption 6 is not implicated absent the disclosure of "the intimate details of [an individual's] personal li[fe] . . . ." 428 F. Supp. at 458. That premise was proved erroneous in *Washington Post.* 456 U.S. at 600.

We are thus left with circuit precedent establishing only that the disclosure of names and addresses is not inherently and always a significant threat to the privacy of those listed; whether it is a significant or a *de minimis* threat depends upon the characteristic(s) revealed by virtue of being on the particular list, and the consequences likely to ensue.

The district court also relied upon *Department of the Air Force v. Rose*, 425 U.S. 352 (1976), and *Arieff v. Department of the Navy*, 712 F.2d 1462 (D.C. Cir. 1983). In each case, the Government opposed disclosure of certain information on the ground that, although the records in question did not on their face identify particular individuals, sufficiently motivated members of the public might be able to link the information to specific individuals. In *Rose*, the Supreme Court responded to this suggestion by observing that "Exemption 6 was directed at threats to privacy interests more palpable than mere possibilities." 425 U.S. at 380, n.19. In a dictum in *Arieff*, we stated more broadly that Exemp-

tion 6 "does not apply to an invasion of privacy produced *as a secondary effect* of the release. . . . [I]t is the very 'production' of the documents which must 'constitute a clearly unwarranted invasion of personal privacy.'" 712 F.2d at 1468 (emphasis in original). The district court thought that these cases stand for the proposition that

> this circuit has recognized only a slight privacy interest in a person's name and address, and has discounted, if not ignored altogether, the possible secondary effects that the release of such information might have on the addressee. Unless the release of names and addresses, *standing alone*, will *embarrass* the individuals involved, [the privacy interest in their non-disclosure is] entitled to little protection.

633 F. Supp. 1244 (emphasis added). This is a misinterpretation of *Rose* and an overreading of *Arieff*.

In virtually every case in which a privacy concern is implicated, someone must take steps after the initial disclosure in order to bring about the untoward effect. Disclosure does not, literally by itself, constitute a harm; it is the requester's (or another's) reaction to the disclosure that can sting. This is only more obvious where disclosure of the information invades someone's privacy not because it is embarrassing but because it invites unwanted intrusions. Where there is a substantial probability that disclosure will cause an interference with personal privacy, it matters not that there may be two or three links in the causal chain. The concern in *Rose* is not, as the district court would have it, with the number of steps that must be taken to get to the threatened effect; rather, *Rose* turns upon the likelihood that the effect will ever come to pass. In that case, there was substantial doubt that any invasion of privacy would occur, and it was that uncertainty that led the court to rule as it did. In this case, there is little reason to doubt that the barrage of solicitations predicted will in fact arrive—

in the mail, over the telephone, and at the front door of the listed annuitants.

Furthermore, any doubt about the meaning of *Rose* was dispelled by the Supreme Court in *Reporters Committee*, where it said that

> even with names redacted [as the requester in *Rose* admitted was proper], subjects of such summaries can often be identified through other, disclosed information. . . . [W]e recognized the potential invasion of privacy through later recognition of identifying details, and approved the Court of Appeals' rule permitting the District Court to delete 'other identifying information' [*i.e.*, other than names] in order to safeguard this privacy interest.

109 S. Ct. at 1479. Clearly, the Court's concern is not limited to those FOIA cases, if any such cases there be, in which the feared invasion of privacy is caused by the release itself, and the better reading of *Arieff* is not to the contrary. The court there painted with a broad brush, but it covered only a modest area; the relevant point being made was that the "mere speculation" of the sort that would be stimulated by disclosure of the drugs being prescribed for unnamed Justices of the Supreme Court, Members of Congress, and their senior staffs is not itself part of the invasion of privacy contemplated by Exemption 6—not because it would be a "secondary effect," but because there was no substantial likelihood that any concrete facts about a particular individual could be inferred.

For the Exemption 6 balance to be implicated, there must, of course, be a causal relationship between the disclosure and the threatened invasion of privacy. Here, there is a substantial probability that the disclosure will lead to the threatened invasion: one need only assume that business people will not overlook an opportunity to get cheaply from the Government what otherwise comes

dearly, a list of qualified prospects for all the special goods, services, and causes likely to appeal to financially secure retirees. It is clearer still that the invasion of the annuitants' privacy will be more than *de minimis*; it will be significant. Nor would the invasion by any less under NARFE's alternative request, made in its supplemental brief, for only the addresses and not the names of the annuitants. As the above analysis makes clear, the privacy concerns raised by the release of the addresses alone are substantially identical to those raised by the release of both the names and addresses.

B. *The Public Interest*

In *Reporters Committee*, the Supreme Court held that, in assaying the public interest, we must examine "the nature of the requested document and its relationship to 'the basic purpose of [FOIA] to open agency action to the light of public scrutiny.'" 109 S. Ct. at 1481 (quoting *Rose*). The Court went on to state that FOIA's

> basic policy . . . focuses on the citizens rights' to be informed about "what their government is up to." Official information that sheds light on an agency's performance of its statutory duties falls squarely within that statutory purpose. That purpose, however, is not fostered by disclosure of information about private citizens that is accumulated in various governmental files but that reveals little or nothing about an agency's own conduct.

Id. That statement is nearly sufficient to resolve this case, for NARFE's only significant public interest claim, as it originally framed this case, was that disclosure of the annuitants' names and addresses would aid NARFE in its lobbying activities, and thus result in the passage of laws that would benefit the public in general and federal retirees in particular. Under *Reporters Committee*, these considerations are not relevant; they involve

not "what the[] Government is up to," but only what it might be up to if NARFE had its druthers.

In order to place something on the puplic interest side of the balance, NARFE suggests, in its supplemental brief, several afterthoughts about the ways in which its interests fall within the ambit of FOIA's purpose, as explicated in *Reporters Committee*. The only argument that merits treatment here is that disclosure of the names and addresses of federal annuitants "would inform the public, at least in part, where its money is going." The Court rejected a similar claim in *Reporters Committee* itself, however, ruling that the rap sheet of a person who "allegedly had improper dealings with a corrupt Congressman and . . . is an officer of a corporation with defense contracts" did not affect the public interest because "it would tell us nothing directly about the character of the *Congressman's* behavior" or "the conduct of the *Department of Defense*" in awarding the contracts. *Id.* at 1482 (emphasis in original). The lesson for this case, *mutatis mutandis*, is that unless the public would learn something directly about the workings of the *Government* by knowing the names and addresses of its annuitants, their disclosure is not affected with the public interest. While we can see how the percentage of the federal budget devoted to annuities, the amount of the benefit an average annuitant receives, or other aggregate data might be of public interest, disclosure of those facts would not be entailed in (and could be accomplished without) releasing the records NARFE seeks here. The simple fact is that those records say nothing of significance about "what the[] Government is up to."

C. *The Balance*

We have been shown no public interest in, and a modest personal privacy interest against, disclosure of the names and addresses of individuals receiving federal employee retirement benefits. We need not linger over

the balance; something, even a modest privacy interest, outweighs nothing every time.

The Supreme Court in *Reporters Committee* noted that "categorical decisions may be appropriate and individual circumstances disregarded when a case fits into a genus in which the balance characteristically tips in one direction." *Id.* at 1483. Just as the Supreme Court did not leave open the possibility that the rap sheet of some subjects might be disclosable and others exempt from disclosure, therefore, we need not inquire into the extent to which each individual whose name would be disclosed would suffer invasions of his or her privacy. Although some federal annuitants might welcome NARFE's literature and the various solicitations that would follow in its wake, no one has suggested that they can be differentiated, either in practice or as a matter of law, from others who might feel differently. It is enough that, with respect to federal annuitants as a group, the privacy concerns inherent in the release of their names and addresses are not insubstantial. We need not determine whether the category should be more broadly defined—to include the names and home addresses of current federal employees, for example—in order to resolve the case before us.

III. Conclusion

We conclude that disclosure of the requested records "would result in a clearly unwarranted invasion of personal privacy." The judgment of the district court is therefore

Reversed.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 86-5446

NATIONAL ASSOCIATION OF RETIRED FEDERAL EMPLOYEES

v.

CONSTANCE BERRY NEWMAN, DIRECTOR
OFFICE OF PERSONNEL MANAGEMENT,
Appellant

Before: Silberman, Buckley and D. H. Ginsburg, Circuit Judges

ORDER

[Filed Sep. 13, 1989]

Upon consideration of appellee's Petition for Rehearing, filed August 21, 1989, it is

ORDERED, by the Court, that the petition is denied.

Per Curiam

FOR THE COURT:

CONSTANCE L. DUPRE
Clerk

By: /s/ Robert A. Bonner
ROBERT A. BONNER
Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 86-5446

NATIONAL ASSOCIATION OF RETIRED FEDERAL EMPLOYEES

v.

CONSTANCE BERRY NEWMAN, DIRECTOR
OFFICE OF PERSONNEL MANAGEMENT,
Appellant

Before: Wald, Chief Judge; Mikva, Edwards, Ruth B. Ginsburg, Silberman, Buckley, Williams, D. H. Ginsburg and Sentelle, Circuit Judges

ORDER

[Filed Sep. 13, 1989]

Appellee's Suggestion For Rehearing *En Banc* has been circulated to the full Court. No member of the Court requested the taking of a vote thereon. Upon consideration of the foregoing it is

ORDERED, by the Court *en banc*, that the suggestion is denied.

Per Curiam

FOR THE COURT:

CONSTANCE L. DUPRE
Clerk

By: /s/ Robert A. Bonner
ROBERT A. BONNER
Deputy Clerk

A statement of Chief Judge Wald is attached.

While I recognize that the Supreme Court's balancing test for Exemption 7(C)'s "unwarranted invasion" of privacy set out in *U.S. Department of Justice v. Reporters Committee for Freedom of the Press*, 109 S. Ct. 1468 (1989), requires primary (or even exclusive) focus on the public benefits flowing from surfacing the workings of government, I am not at all convinced that so exclusive a test is appropriate for more neutral non-law enforcement records with limited potential for privacy invasions, such as addresses of retirees from the federal government. Because, however, I find the reasoning and result not without some plausibility in this case, I do not vote for rehearing *en banc*. I do, however, foresee outright conflict with the language and intent of the Freedom of Information Act if the *Reporters* test is applied inflexibly in all future Exemption 6 cases. *Cf. FLRA v. U.S. Dep't of Treasury*, No. 87-1107 (D.C. Cir. Sept. 12, 1989) (Ruth B. Ginsburg concurring opinion).

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 85-1739

NATIONAL ASSOCIATION OF RETIRED FEDERAL EMPLOYEES,
Plaintiff,

v.

CONSTANCE HORNER,* Director,
Office of Personnel Management,
Defendant.

OPINION AND ORDER

[Filed Apr. 28, 1986]

Plaintiff, National Association of Retired Federal Employees ("NARFE"), a non-profit association which concerns itself with the administration of the federal government's civilian retirement systems as well as other issues affecting the aged and aging, brought this action under the Freedom of Information Act, 5 U.S.C. § 552, (FOIA), seeking the names and addresses of persons added to the annuity rolls between April 1, 1981 and December 31, 1984. Plaintiff seeks to use the names for the purpose of making a one-time written contact with recent annuitants in order to describe the association's goals and services and to solicit membership. Defendant, Office of Personnel Management ("OPM"), refused to

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* Pursuant to Rule 25(d) of the Federal Rules of Civil Procedure, Constance Horner, Director of Office of Personnel Management, has been substituted for Loretta Cornelius, who is no longer Acting Director of that Office.

provide the information on the grounds that disclosure would constitute a "clearly unwarranted invasion of personal privacy" within the meaning of 5 U.S.C. § 552(b)(6). Following an unsuccessful administrative appeal, plaintiff filed this action. For the reasons set forth below, the Court grants summary judgment in favor of plaintiff.

I.

Between 1979 and 1981, OPM and its predecessor, the Civil Service Commission, assisted plaintiff in making blind mailings to persons recently joining the federal annuity rolls. As a result of these mailings, which described NARFE's purposes and solicited new members, plaintiff's membership doubled to approximately 487,500. In May 1982, OPM advised plaintiff that for policy reasons it was discontinuing its prior practice of providing the mailing labels, and invited plaintiff to submit a FOIA request for the information. That request was then denied on the ground that release of the names and addresses would constitute a clearly unwarranted invasion of the addressees' personal privacy. Plaintiff appealed this denial administratively, offering in its letter of appeal to forego receipt of the names and take only addresses in order to make a "Dear Annuitant" mailing. The appeal was subsequently denied.

Since it lost access to the names and addresses formerly provided by defendant, plaintiff has experienced a significant decrease in its rate of growth, increasing by only approximately 5,000 members. According to defendant, during the period in question more than 535,000 persons have been added to the annuity rolls. Plaintiff states that it will use the names and addresses for a one-time mailing only, and that it will make no follow-up contact of any kind unless the annuitants request further information. Plaintiff also points out that its by-laws prohibit it from selling or otherwise distributing lists and computed labels of prospective members.

Following denial of its administrative appeal, plaintiff filed this action and the cross-motions for summary judgment now before the Court followed. The sole question presented is whether defendant properly invoked FOIA's Exemption 6 in refusing to disclose the information requested.

II.

As the Supreme Court has noted, FOIA embodies "a general philosophy of full agency disclosure unless information is exempted under clearly delineated statutory language." *Department of Air Force v. Rose*, 425 U.S. 357, 361 (1976). Exemption 6 permits an agency to withhold personnel and medical files or similar files, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy. 5 U.S.C. § 552(b)(6). Congress' primary concern in drafting this exemption was to provide for the confidentiality of personal matters. *United States Department of State v. Washington Post Co.*, 456 U.S. 595, 599-600 (1980). The parties agree that the information sought here falls within the catch-all phrase of "similar files." They differ only as to whether disclosure of the information would result in a clearly unwarranted invasion of personal privacy. In deciding that question, this Court must balance the public interest in disclosure of the information against the privacy interests of the annuitants, *see Department of the Air Force v. Rose*, 425 U.S. at 372, bearing in mind that the dominant objective of FOIA is to provide the fullest possible disclosure of agency records, *id.* at 361, and that Exemption 6's "clearly unwarranted" standard generally tips the balance of interests in favor of disclosure. *Washington Post Co. v. United States Dep't of Health*, 690 F.2d 252, 261 (D.C. Cir. 1982); *Getman v. NLRB*, 450 F.2d 670, 674 n.11 (D.C. Cir. 1971).

In justifying its refusal to release the information sought here, defendant claims that the federal annuitants in this case have "significant privacy interests in non-

disclosure of their home addresses." Defendant's Motion for Summary Judgment at 9. In so arguing, defendant relies on a series of decisions in which other circuits have recognized a substantial privacy interest in home addresses. *See Heights Community Congress v. Veterans Administration*, 732 F.2d 526, 529 (6th Cir. 1984) ("important privacy interest" in home addresses); *American Federation of Government Employees* v. *United States*, 712 F.2d 931, 932 (4th Cir. 1983) (*per curiam*) ("employees have strong privacy interest in their home addresses"); *Wine Hobby USA, Inc. v. IRS*, 502 F.2d 133, 136-37 (3d Cir. 1974) (privacy of the home traditionally respected). Whatever the merits of these decisions, this Circuit has not seen fit to follow them. Indeed, the case law in this Circuit has identified only a slight privacy interest in such information. *Ditlow v. Shultz*, 517 F.2d 166, 170 (D.C. Cir. 1975) (disclosure of names and addresses would result in less than substantial invasion of privacy); *Getman v. NLRB*, 450 F.2d at 674-75 (disclosure of names and addresses would result in relatively minor loss of privacy); *Disabled Officer's Ass'n v. Rumsfeld*, 428 F. Supp. 454, 458 (D.D.C. 1977), *aff'd without opinion sub nom., Disabled Officers Ass'n v. Brown*, 574 F.2d 636 (D.C. Cir. 1978); *see also Rural Housing Alliance v. Dep't of Agriculture*, 498 F.2d 73, 77 (D.C. Cir. 1974). As the Court of Appeals noted in *Getman*, the "real thrust of Exemption 6 is to guard against unnecessary disclosure of files . . . which would contain 'intimate details' of a 'highly personal' nature." 450 F.2d at 675 (footnotes omitted). Disclosure of names and addresses, on the other hand, reveals nothing that would embarrass the addressee. *Id.*

Defendant attempts to buttress its claim of a substantial privacy interest by arguing that "many, if not most, of the annuitants would find [plaintiff's] membership solicitations" annoying or harassing. Defendant's Motion for Summary Judgment at 8. In *Disabled Officer's Ass'n*, however, the Court rejected precisely such an argument.

There, the plaintiff sought the names and addresses of disabled, retired military officers in order to mail such persons brochures describing the association and to solicit new members. Such an infringement of the addresse's privacy, the Court concluded, while not inconsequential, was nevertheless minimal as it did not involve disclosure of any embarrassing or intimate information. 428 F. Supp. at 458. So also in *Getman*, the District of Columbia Circuit permitted disclosure of names and addresses of employees to a law professor who wished to contact the employees in order to conduct a study of union representation elections. In both cases, the addresses could have found contact with the plaintiffs annoying or bothersome; the courts, however, did not consider this possibility sufficiently important to warrant a finding that the privacy interests at stake were substantial. Moreover, under the statute, it is the very production of the documents which must constitute a clearly unwarranted invasion of pjrivacy. *National Ass'n of Atomic Veterans v. Director, Defense Nuclear Agency*, 583 F. Supp. 1483, 1487-88 (D.D.C. 1984). An agency may not rely on "unsubstantiated speculation about possible secondary effects of disclosure" or "the mere potential for invasion of privacy" in justifying a refusal to disclose information based on Exemption 6. *Id. See also Department of Air Force v. Rose*, 425 U.S. at 380 n.19 (Exemption 6 directed at threats to privacy interests more palpable than mere possibilities); *Arieff v. Dep't of the Navy*, 712 F.2d 1462, 1468 (D.C. Cir. 1983) (production of documents, not secondary effects of release, must be the source of invasion of privacy). Indeed, in *Arieff*, the Court of Appeals noted that while the release of agency information might subject the agency to irate telephone calls at his home, such a secondary effect is not the sort of invasion of privacy that can support an Exemption 6 claim. 712 F.2d at 1468.

Finally, there is at least some evidence which casts doubt on the validity of defendant's prediction that most

annuitants would be annoyed by contact from plaintiff. The record indicates that approximately half of plaintiffs current membership, or some quarter of a million people, joined the association during the period it conducted blind mailings. While the Court does not know how many of these people joined because of the solicitation, or how many were contacted altogether, this considerable figure suggests that a substantial percentage of annuitants would welcome information about plaintiff and consider such information a personal benefit.

Be that as it may, this circuit has recognized only a slight privacy interest in a person's name and address, and has discounted, if not ignored altogether, the possible secondary effects that the release of such information might have on the addressee. Unless the release of names and addresses, standing alone, will embarrass the individuals involved, this circuit has determined that the information is entitled to little protection.

Against the relatively minor privacy interest, then, the Court must weigh the public interest in disclosure. *Department of the Air Force v. Rose*, 425 U.S. at 372. While defendant suggests that the public interest must flow directly from the disclosure itself, and not from speculative secondary effects based on plaintiff's proposed use of the information, this again is not the law in this circuit. Indeed, in *Ditlow v. Shultz*, 517 F.2d at 171-72 n.21, the Court of Appeals stated that the "interest in disclosure to the public may be characterized by showing the uses contemplated by some members of the public specifically, but not exclusively, the plaintiffs."

Plaintiff proposes to use the information to inform annuitants of the association's goals and services, and to solicit new members. As an organization, plaintiff lobbies on behalf of its members before the legislative and executive branches, informs members of their rights and entitlements, and keeps them abreast of changes in the law.

The situation here, then, is directly analogous to that presented in *Disabled Officer's Ass'n*. There too, the plaintiff intended to use the information "to inform [retired disabled military officers] of its existence and purpose and to solicit their membership." 428 F. Supp. at 458. The plaintiff served the interests of the members by lobbying on their behalf, apprising them of government activities affecting them, and assisting members in pursuing benefits to which they might be entitled. *Id.* The Court found that these services, in and of themselves, along with the fact that many of the addresses might be desirous of joining the association, created a public interest in disclosure sufficient to overcome the relatively slight privacy interests involved.

Defendant attempts to distinguish *Disabled Officer's Ass'n* on the grounds that there the plaintiff's membership had declined substantially and the organization was in danger of dying by attrition, while NARFE currently numbers nearly half a million members and is still growing, albeit at a drastically reduced rate. The Court, however, does not view such a distinction as controlling. The public interest identified in *Disabled Officer's Ass'n* derived from the organization's services, not from its mere existence. It is unlikely that, had the organization's membership been stable rather than declining, the court would have refused disclosure on the grounds that the association was reaching enough people, or was already performing its services well enough. So too here, the public interest in disclosure flows from NARFE's services and the fact that many annuitants might be pleased to learn of them. If plaintiff's continued existence were in danger, that might strengthen its claim of a public interest in release of the addresses; the fact that its membership is relatively large, however, does not undermine its claim.

Finally, defendant argues that plaintiff could contact recent annuitants through less intrusive means, such as

advertising. It is true that the availability of alternative sources of the information sought is a factor to be weighed in the balancing process. *Ditlow v. Shultz*, 517 F.2d at 172-73. Since plaintiff lost access to defendant's mailing lists, its membership has increased by only 4,000 at a time when some 535,000 new names were placed on the annuity rolls. While the record does not indicate precisely what alternative solicitation methods plaintiff has employed during this period, it is clear they have been largely unsuccessful. Defendant suggests advertising as an appropriate alternative, but as plaintiff's potential members are to be found in all 50 states, such a recruitment strategy is certain to be expensive. Moreover, the claim that an organization can advertise through the media could be made in every "names and addresses" case, and could have been raised in the *Disabled Officer's Ass'n* or *National Ass'n of Atomic Veterans* cases. Such a blanket claim does little to assist the Court in determining whether the public interest in disclosure outweighs the privacy interests at stake.

Conclusion

In light of the general philosophy of disclosure that animates FOIA, and the high standard set out in Exemption 6 tilting the balance in favor of disclosure, this Court concludes that defendant improperly withheld the information sought by plaintiff in this case. Given the relatively minor invasion of privacy that will be occasioned by release of the names and addresses, and the public interest in disclosure, this Court finds that the information must be released. It is therefore, this 28th day of April, 1986

ORDERED that summary judgment be and it hereby is granted in favor of plaintiff and against defendant and that defendant be and it hereby is ordered to promptly release to plaintiff the names and addresses of all per-

sons added to the federal annuity rolls between April 1, 1981 and December 31, 1984.

SO ORDERED.

/s/ Joyce Hens Green
JOYCE HENS GREEN
United States District Judge

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 85-1739

NATIONAL ASSOCIATION OF RETIRED FEDERAL EMPLOYEES,
Plaintiff,

v.

CONSTANCE HORNER, Director,
Office of Personnel Management,
Defendant.

JUDGMENT

Pursuant to the Opinion and Order entered in this action this same day, judgment be and it hereby is entered in favor of plaintiff National Association of Retired Federal Employees and against Constance Horner, Director of Office of Personnel Management.

/s/ Joyce Hens Green
JOYCE HENS GREEN
United States District Judge

April 28, 1986

FILED
MAR 19 1990
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-1098

In the Supreme Court of the United States

OCTOBER TERM, 1989

NATIONAL ASSOCIATION OF RETIRED FEDERAL EMPLOYEES,
PETITIONER

v.

CONSTANCE BERRY NEWMAN, DIRECTOR,
OFFICE OF PERSONNEL MANAGEMENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

JOHN G. ROBERTS, JR.
Acting Solicitor General
STUART M. GERSON
Assistant Attorney General
LEONARD SCHAITMAN
JOHN F. DALY
Attorneys
Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTION PRESENTED

Whether the court of appeals correctly concluded that the invasion of personal privacy that would result from public dissemination of a list of the names and addresses of recent federal retirees outweighs any public interest in dissemination, so that release of the list is barred by Exemption 6 of the Freedom of Information Act, 5 U.S.C. 552(b)(6).

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. la-14a) is reported at 879 F.2d 873. The opinion and order of the district court (Pet. App. 18a-26a) are reported at 633 F. Supp. 1241.

JURISDICTION

The judgment of the court of appeals was entered on July 7, 1989. A petition for rehearing was denied on September 13, 1989 (Pet. App. 16a-17a). On December 6, 1989, the Chief Justice extended the time for filing a petition for a writ of certiorari to January 11, 1990, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

This case arises under Exemption 6 of the Freedom of Information Act (FOIA), 5 U.S.C. 552(b)(6), which exempts information from disclosure if its release "would constitute a clearly unwarranted invasion of personal privacy." This language requires "the balancing of private against public interests" to determine whether the release of personal information may nevertheless be "warranted." *United States Dep't of State* v. *Washington Post Co.*, 456 U.S. 595, 599 (1982); *Department of the Air Force* v. *Rose*, 425 U.S. 352, 373 (1976).

Petitioner, the National Association of Retired Federal Employees (NARFE), sought a list of the names and home addresses of persons who had recently become federal annuitants – *i.e.*, recent federal retirees and others who had been added to the federal annuity rolls due to disability or survivorship. The Office of Personnel Management (OPM) denied the request. OPM concluded that public release of the information would constitute a "clearly unwarranted invasion of personal privacy," and it was thus exempt from disclosure pursuant to FOIA Exemption 6.[1]

NARFE brought the present action to compel disclosure of the names and addresses, and the district court granted its motion for summary judgment. Pet. App. 18a-26a. The district court ruled that the privacy interest federal retirees have in public release of their names and home addresses is "slight" because such information does not convey " 'intimate details' of a 'highly personal' nature." Pet. App.

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[1] From 1979 and 1981, OPM had facilitated NARFE's communications with new annuitants – without releasing the names and home addresses of such persons – by cooperating in "blind mailings" in which NARFE would prepare informational materials and OPM would arrange for mailing at NARFE's expense. OPM discontinued this practice in 1981.

21a (quoting *Getman* v. *NLRB*, 450 F.2d 670, 675 (D.C. Cir. 1971)). In assessing the weight of the public interest supporting disclosure, the district court focused on NARFE's claim that it would use the information "to inform annuitants of the association's goals and services, and to solicit new members." Pet. App. 23a. The court concluded that the public interest outweighed the privacy interest. *Id.* at 25a.

Following initial briefing and argument, the court of appeals held the case in abeyance pending this Court's decision in *United States Dep't of Justice* v. *Reporters Committee for Freedom of the Press*, 109 S. Ct. 1468 (1989). After further briefing in light of *Reporters Committee*, the court of appeals reversed the order of the district court. In analyzing the privacy interest at stake, the court of appeals began by recognizing that Exemption 6 applies to all personal information, and not merely to "intimate" matters. Pet. App. 4a (citing *United States Dep't of State* v. *Washington Post Co.*, 456 U.S. at 600). The court also noted that, under *Reporters Committee*, the invasion of privacy must be assessed not by reference to the use the particular requester proposes to make of the information, but by reference to the "unlimited disclosure" of the subjects' names and home addresses that would be required if the information were released to *any* requester. Pet. App. 4a-5a. After considering both the inherent interest individuals have in "control over the disclosure of their own identities and whereabouts" and the inevitable practical consequences of the release of such a commercially useful mailing list (*id.* at 6a-7a), the court of appeals concluded that public dissemination of the information in question "would interfere with the subjects' reasonable expectations of undisturbed enjoyment in the solitude and seclusion of their own homes" (*id.* at 7a).

Turning to the public interest side of the Exemption 6 balance, the court of appeals recognized that, under the test articulated by this Court in *Reporters Committee*, the purported beneficial effects of NARFE's activities on behalf of federal retirees are irrelevant to the inquiry. Pet. App. 12a. Rather, the court explained, the question is whether disclosure would further *FOIA*'s core purpose, informing the public about "what their Government is up to." *Id.* at 13a. (quoting *Reporters Committee*, 109 S. Ct. at 1481). The court determined that disclosure of the names and home addresses of federal annuitants would not further that purpose. Pet. App. 12a-13a.

Having found a substantial privacy interest at stake and no public interest in disclosure, the court of appeals had no difficulty in striking an appropriate balance, since "something, even a modest privacy interest, outweighs nothing every time." Pet. App. 14a. Accordingly, the court held that "disclosure of the requested records 'would result in a clearly unwarranted invasion of personal privacy.' " *Ibid.* (quoting 5 U.S.C. 552(b)(6)).

ARGUMENT

Contrary to petitioner's contentions, the decision of the court of appeals is a correct and straightforward application of the principles recently enunciated by this Court in *Reporters Committee*. In the absence of any conflict in the courts of appeals (and petitioner does not allege a conflict), there is no warrant for further review.

1. In weighing the competing public and private interests, the court of appeals properly looked to this Court's recent decision in *Reporters Committee*, which addressed the nature of these interests under the similar balancing test of FOIA Exemption 7(C), 5 U.S.C. 552(b)(7)(C). Although Exemption 7(C) (which applies only to "law enforcement

records") affords "somewhat broader" protections than Exemption 6 (*Reporters Committee*, 109 S. Ct. at 1473), the underlying considerations involved under both exemptions are sufficiently analogous to make it appropriate to take account of precedents under one exemption when construing the other (*id.* at 1479).

NARFE focuses on the differences between Exemptions 6 and 7(C), and argues that the court of appeals erred due to its failure to heed "dispositive distinctions" between the two exemptions. Pet. 5-6. NARFE greatly overstates those differences. On the invasion of privacy side of the balance, NARFE notes that Exemption 7(C) prohibits the release of information that "could reasonably be expected" to constitute an invasion of privacy, while Exemption 6 speaks of information that "would constitute" such an invasion. Pet. 6-7. From this premise, NARFE faults the court of appeals for "speculation" in its assessment of the invasion of privacy inherent in the release of the information NARFE seeks here. Pet. 7-8. "Speculation" is allowed, in its view, under Exemption 7(C) but not under Exemption 6.

This argument is mistaken both in its characterization of the court of appeals' analysis and in its suppositions about the proper approach to evaluating the nature of the privacy interest under Exemption 6. As an initial matter, there was no speculation concerning the fact of invasion of privacy in this case. The information NARFE seeks would, on its face, reveal the names and addresses of many thousands of individuals, along with the fact that each one of these persons has recently become a federal annuitant. This is not simply a "threat[ ] to privacy interests" or a "mere possibilit[y]" of disclosure. Pet. 8 (quoting *Department of the Air Force* v. *Rose*, 425 U.S. at 380 n.19).[2] This

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[2] *Rose* concerned the requested release of redacted records that would not on their face have revealed anything about identified individuals,

case involves a direct disclosure of personal information. As the court of appeals noted, the very release of such information implicates significant privacy interests (Pet. App. 5a-6a)—a conclusion fully consistent with this Court's recognition that the term "privacy encompass[es] the individual's control of information concerning his or her person." *Reporters Committee*, 109 S. Ct. at 1476.

In addition to drawing this basic conclusion that the release of federal retirees' names and addresses infringes privacy interests, the court of appeals went on to consider the *extent* of such interests. While this portion of the court of appeals' analysis focused on the "substantial probability" that such infringement will be significant because "business people will not overlook an opportunity to get cheaply from the Government what otherwise comes dearly" (Pet. App. 11a-12a), NARFE errs in supposing that this sort of analysis is improper. As the court of appeals noted, this Court recognized in *Reporters Committee* that a full consideration of the privacy interests implicated by the release of personal information includes a practical assessment of the potential effects of disclosure. *Id.* at 11a (quoting *Reporters Committee*, 109 S. Ct. at 1478). Where analysis of such effects is necessary,[3] moreover, it will

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but which might have indirectly revealed such information to those able to couple the facts revealed with prior knowledge. 425 U.S. at 380-381. A similar situation was presented in *Arieff* v. *Department of the Navy*, 712 F.2d 1462 (D.C. Cir. 1983). As the court of appeals recognized, the key distinguishing feature of those cases—not shared by the present case—was the presence of "substantial doubt that any invasion of privacy would occur." Pet. App. 10a.

[3] This portion of the court of appeals' analysis was arguably unnecessary in the present case, in light of the court's conclusions that some significant privacy interests are implicated by the very fact of disclosure of name and address information (Pet. App. 5a-6a) and that there is *no* public interest under FOIA in the release of such information

inevitably entail assessments of likelihoods rather than certainties, because it must be conducted at a time when the dissemination of the information at issue is a hypothetical, future event. Regardless of whether a case involves Exemption 6 or Exemption 7(C), a court will improperly ignore an important element of analysis unless it makes an effort to assess the extent of the likely intrusion on personal privacy interests. Indeed, this Court's discussion of this point in *Reporters Committee* indicates that the same sort of analysis of "potential invasion of privacy" is required in Exemption 6 cases, such as *Rose*. 109 S. Ct. at 1479.

Thus, neither precedent nor logic supports NARFE's contention that courts applying Exemption 6 must ignore the likely consequences of dissemination unless the record shows that such consequences are a certainty. While the textual difference between the two exemptions doubtless means that there is greater flexibility in the sort of showing that is necessary in an Exemption 7(C) case (see 109 S. Ct. at 1473 n.9), the difference is more sensibly seen as one of degree. This difference may be dispositive in a case where a claimed adverse effect of disclosure is truly a matter of speculation. Here, however, the intrusive effects on which the court of appeals focused are ones which would follow predictably from the release of the information NARFE seeks—a list of names and addresses of individuals who have a guaranteed, regular annuity income, and are either retirees or disabled. The court of appeals was right to apply a common-sense approach to the assessment of the annuitants' privacy interests, which led to the conclusion that they would

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(*id.* at 13a). Because "something • • • outweighs nothing every time" (*id.* at 14a), these conclusions by themselves are sufficient to support the court's disposition of the case. Accordingly, the result in this case would be the same even if NARFE were correct in its criticisms of the court of appeals' analysis of the likely effects of disclosure.

be subjected to a "barrage of solicitations" if such lists were made available. Pet. App. 10a.

2. Exemptions 6 and 7(C) also differ in that Exemption 6 requires the withholding of information where the invasion of privacy occasioned by release is "clearly unwarranted," while Exemption 7(C) prohibits release where it is "unwarranted." Citing that difference, NARFE contends (Pet. 9) that it is not enough, in an Exemption 6 case, to know that there is no public interest warranting disclosure. Contrary to its contention, the language of the statute does not support that conclusion.

In *Reporters Committee*, this Court provided important clarification regarding the types of public interest that may warrant the release of information despite the existence of privacy concerns. The Court ruled that "whether disclosure * * * is warranted must turn on the nature of the requested document and its relationship to 'the basic purpose of the Freedom of Information Act "to open agency action to the light of public scrutiny." ' " 109 S. Ct. at 1481 (quoting *Rose*, 425 U.S. at 372). Where the release of particular information does not serve the purpose of furthering "the citizens' right to be informed about 'what their government is up to' " (109 S. Ct. at 1481), there is no "public interest" to warrant disclosure.

The court of appeals followed these principles in a straightforward manner, concluding that there is *no* relevant public interest in the release of the information NARFE seeks, and therefore that even a modest invasion of privacy would not be warranted. Pet. App. 12a-13a. NARFE argues, however, that *Reporters Committee* is not applicable in an Exemption 6 case because, in its view, one can conclude that a disclosure is "clearly unwarranted" only by concluding that it would not only fail to serve FOIA's core purposes as defined by *Reporters Committee*, but that it would

also fail to serve an ill-defined set of other purposes set forth by NARFE. Pet. 10.

There is no reason to suppose that the word "clearly" requires analysis of purposes other than the purpose of FOIA; rather, the word denotes that, under Exemption 6, it must be *clear* that disclosure is not warranted. In those cases where there is something on each side of the balance, this may be an important difference, for it can properly be used to "tilt the balance" in favor of disclosure. See *Washington Post Co.* v. *HHS*, 690 F.2d 252, 261 (D.C. Cir. 1982) (quoting *Ditlow* v. *Shultz*, 517 F.2d 166, 169 (D.C. Cir. 1975)). Where, however—as in the present case—a court determines that there is *no* public interest in disclosure, no amount of "tilting" can warrant disclosure, and a court may readily conclude that an invasion of privacy is "clearly unwarranted."

Furthermore, the additional "public interests" that NARFE seeks to incorporate into the Exemption 6 analysis are of precisely the sort rejected in *Reporters Committee*. Significantly, all of the purported "public" interests that NARFE advances (Pet. 10-12) relate to the supposedly beneficial uses to which *it* would put the information it seeks, such as by "represent[ing] the rights and interests of retired federal employees." As this Court recognized in *Reporters Committee*, however, reliance on such considerations would be contrary to the fundamental FOIA principle that "Congress 'clearly intended' the FOIA 'to give any member of the public as much right to disclosure as one with a special interest' " in a particular document. 109 S. Ct. at 1480-1481 (quoting *NLRB* v. *Sears, Roebuck & Co.*, 421 U.S. 132, 149 (1975)). NARFE presents no reason why this principle, recognized as critical to the analysis under Exemption 7(C), should be ignored under Exemption 6.

Although NARFE attempts to relate its own interests to "facilitat[ing] the democratic process" (Pet. 11), its arguments are similar to the attenuated "public interest" arguments that this Court rejected in *Reporters Committee*. While the respondents in that case asserted that there was a broad public interest in information relating to persons who have dealings with the government (*e.g.*, defense contractors), the Court recognized that a principled analysis of the "public interest" must have a more precise focus, inquiring whether disclosure would "shed any light on the conduct of any Government agency or official." 109 S. Ct. at 1481.[4] NARFE does not even purport to argue that the information it seeks would serve any such purpose.[5] As the court of appeals concluded, "[t]he simple fact is that those records say nothing of significance about 'what the[ ] Government is up to.' " Pet. App. 13a.

3. Finally, NARFE complains (Pet. 13) of the supposedly sweeping nature of the court of appeals' ruling, which it asserts will make it impossible for any organization to use FOIA as a means of obtaining mailing lists from the federal government. This complaint is ironic in light of the care with which the court of appeals limited its ruling. Since, in our view, there is an extraordinarily small likelihood that

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[4] One reason why such a properly delimited "public interest" test is necessary is to avoid the "idiosyncratic" judgments that would be called for under a more broad-ranging test. See *Reporters Committee*, 109 S. Ct. at 1474 (quoting the court of appeals' decision, *Reporters Comm. For Freedom of the Press v. United States Dep't of Justice*, 816 F.2d 730, 741 (D.C. Cir. 1987)). NARFE's expansion of the "core purposes" analysis would engender the same sort of standardless inquiries that this Court sought to avoid in *Reporters Committee*.

[5] NARFE's argument that its litigation on behalf of federal retirees furthers the "public interest"—it specifically contends that if it prevails the retirees will receive additional money and therefore owe additional federal taxes (Pet. 11-12)—is frivolous. Under such logic, *any* purely private financial interest would be transformed into a "public" interest.

the names and addresses of individuals in government files could *ever* serve a public interest as defined in *Reporters Committee*, the court of appeals might well have been justified in making a more categorical holding that Exemption 6 bars the use of FOIA to obtain such mailing lists. Cf. 109 S. Ct. at 1483-1485. The court of appeals, however, carefully avoided passing on this broad issue (Pet. App. 14a), and preserved the possibility of a contrary result where the privacy interests at stake are "*de minimis*" (*id.* at 3a, 8a-9a).[6]

The care with which the court of appeals limited its ruling militates against the grant of certiorari in the present case. Because the court of appeals did not purport to set down a blanket rule affecting all requests for name and address lists, it is too early to assess the impact of its approach. Other cases, presenting differing factual situations, may or may not confirm our position that the release of such lists will seldom, if ever, be warranted by any legitimate public interest. Certainly this single decision does not present any issue requiring review by this Court.

Furthermore, this Court's ruling in *Reporters Committee*, which greatly clarified the proper approach to the balancing of private and public interests under FOIA, was

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[6] NARFE argues that Congress's consideration in 1983 of proposed legislation that would have made specific mention of name and address lists undermines the decision below. In so arguing, NARFE ignores "the oft-repeated warning that 'the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one.' " *Consumer Product Safety Comm'n* v. *GTE Sylvania, Inc.*, 447 U.S. 102, 117 (1980) (quoting *United States* v. *Price*, 361 U.S. 304, 313 (1960)). This hazard is particularly acute here, moreover, since the "legislative history" on which NARFE relies relates to legislation that was never adopted. See *FTC* v. *Dean Foods Co.*, 384 U.S. 597, 609-610 & n.11 (1966). Such inconclusive legislative activity in 1983 sheds no light on the meaning of Exemption 6, adopted as part of the original FOIA in 1966.

handed down less than one year ago. Only a handful of courts have had occasion to apply its teachings to either of the FOIA privacy exemptions, and, apart from the present case, only one other decision has discussed in any detail its application to Exemption 6. See *FLRA* v. *United States Dep't of the Treasury*, 884 F.2d 1446 (D.C. Cir. 1989). This Court recently denied petitions for a writ of certiorari seeking review of that decision (*AFGE* v. *Department of HHS; National Treasury Employees Union* v. *United States Dep't of Treasury*, 110 S. Ct. 863 (No. 89-444; No. 89-566) and 110 S. Ct. 864 (No. 89-853) (1990)), and no different result is warranted here. NARFE does not contend that there is any division of authority regarding the proper application of the principles of *Reporters Committee* to cases under Exemption 6, and has presented no special reasons why the Court should address this issue now. On the contrary, NARFE stresses that issues similar to those presented in this case are likely to "arise in virtually every federal agency and court throughout the country." Pet. 5. Accordingly, there will be ample time for this Court to revisit the issues addressed so recently in *Reporters Committee* if and when future decisions by the lower courts indicate a need for it to do so.

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

JOHN G. ROBERTS, JR.
*Acting Solicitor General**

STUART M. GERSON
Assistant Attorney General

LEONARD SCHAITMAN
JOHN F. DALY
Attorneys

MARCH 1990

*The Solicitor General is disqualified in this case.

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